

*Appendix A*

having learned in mid-September that Olivia Miller had not fully complied with the preliminary injunction.

In early November 2003, Olivia Miller conceded liability. At a December 10 damages hearing, the district court found that Olivia Miller's infringement was not willful, and set statutory damages at \$2,000. At a June 2004 attorney's fees hearing, the court awarded GMA \$5,000 in fees, against its claim of \$37,000. GMA appeals the size of both the damages award and of the attorney's fees granted. Specifically, GMA argues that the court's damages award is premised in part on an incorrect finding of non-willfulness. GMA also contends that the court should have ordered payment to it of the fees expended in attempting to secure Olivia Miller's compliance with the preliminary injunction.

*1. Willful Infringement*

We review a district court's factual determination of willful copyright infringement for clear error. *Hamil America, Inc., v. GFI*, 193 F.3d 92, 97 (2d Cir.1999). In so doing, we "give particular deference to determinations regarding witness credibility." *Id.* "The standard is simply whether the defendant had knowledge that its conduct represented infringement or perhaps recklessly disregarded that possibility." *Id.* (internal quotation marks omitted). Knowledge that an infringer's conduct represents infringement may be either actual or "constructive." *Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 264 (2d Cir.2005) (noting that a plaintiff can prove willfulness "by proffering circumstantial evidence that gives rise to an inference of willful conduct").

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We cannot say on this record that the district court's determination that Olivia Miller's copyright infringement was non-willful was clearly erroneous. Chief Judge Mukasey based his finding on the testimony of the Olivia Miller sales manager, that the floral pattern she was shown did not bear a copyright notice. The court also noted, moreover, that Olivia Miller had never before been sued for copyright infringement, and generally is "diligent about assuring that it does not reproduce protected designs." A reasonable trier of fact could have concluded, as the district court did, that Olivia Miller neither had knowledge that its actions represented infringement nor had recklessly disregarded the possibility.<sup>2</sup>

GMA contends that Olivia Miller's failure to comply with the terms of the July 2003 preliminary injunction "goes beyond innocent ignorance." To be sure, we have held that an infringer's demonstrated awareness of the plaintiff's allegations can constitute constructive knowledge sufficient to compel a finding of willfulness. *See, e.g., N.A.S. Import Corp. v. Chenson Enters.*, 968 F.2d 250, 252-53 (2d Cir.1992) (reversing the district court's finding of non-willful infringement where the defendant's attorney sent a letter promising to cease infringing and the infringement, instead, continued). The district court took notice of Olivia Miller's failure to circulate timely a copy of the preliminary injunction to its customers and its supplier. But the court noted in

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2. We note in passing that even were we to reverse the district court's finding that Olivia Miller's infringement was not willful, it would not necessarily alter the damages award. *See* 17 U.S.C. § 504(c)(2) (providing that the power to increase a statutory damages award based on a finding of willful infringement rests within the discretion of the district court).

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connection with this failure that Olivia Miller's sales manager had relied on a statement of a Deb Shops representative that, as the district court stated, allowed Olivia Miller to believe that "the matter was minor and was being worked out." In light of the record in its entirety, the district court was free to infer from these facts that Olivia Miller's infringement was not willful. *See Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").<sup>3</sup>

*2. Attorney's Fees*

We review a district court's award of attorney's fees for abuse of discretion. *Crescent Publ'g Grp. v. Playboy Enters.*, 246 F.3d 142, 146 (2d Cir.2001). We have described the scope of our review of fees awards as "highly deferential." *Id.* (quoting *Alderman v. Pan Am World Airways*, 169 F.3d 99, 102 (2d Cir.1999)). The Supreme Court has held that "[t]here is no precise rule or formula" for determining a proper attorney's fees award, but that "equitable discretion should be exercised in light of the considerations [the Court has] identified." *Fogerty v. Fantasy*, 510 U.S. 517, 534, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (internal quotation marks

3. We note, moreover, that whether Deb Shops, in failing promptly to forward a copy of the preliminary injunction to its customers and its supplier, was guilty of continuing infringement is not clear. Lacking any allegation—much less a district court finding—that Olivia Miller violated the Copyright Act after the date of the preliminary injunction, we cannot find clear error in the district court's finding that failure to comply was not willful infringement.

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omitted). These considerations include “ ‘frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.’ ” *Crescent Publ'g Grp.*, 246 F.3d at 147 (quoting *Fogerty*, 510 U.S. at 534 n. 19, 114 S.Ct. 1023).

In setting a fee award of \$5,000, the district court relied on, inter alia, GMA's three-week delay in bringing its suit; the small size of actual damages; the limited scope of the infringement; and counsel's belated attempt to accept an offer of judgment only after learning of the size of the statutory damages award. Chief Judge Mukasey did not abuse his discretion in awarding less than the full measure of attorney's fees sought. *Cf. Gonzales v. Transfer Techs.*, 301 F.3d 608 (7th Cir.2002) (vacating and remanding for reconsideration where a district court granted no attorney's fees at all).

We have considered all of GMA's arguments and find them to be without merit. We therefore AFFIRM the judgment of the district court.

For the Court,

ROSEANN B. MACKECHNIE  
Clerk of the Court

by: Richard Alcantara, Deputy Clerk

**APPENDIX B — JUDGMENT OF THE UNITED  
STATES DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK FILED JULY 14, 2004**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

03 CV 4906 (MBM)

GMA ACCESSORIES, INC.

Plaintiff,

- against -

OLIVIA MILLER, INC. and DEB SHOP, INC.,

Defendants.

**JUDGMENT**

This action having been commenced on June 30, 2003 by filing of a summons and complaint; and defendant Deb Shop, Inc., having been dismissed by notice of dismissal dated July 10, 2003; and defendant Olivia Miller having answered the summons and complaint by answer filed on August 20, 2003; and the non-copyright counts of the complaint having been dismissed by the Court by order dated October 27, 2003; and defendant, Olivia Miller having admitted liability, a trial having been held before the Court on damages only, on December 10, 2003; and by the memorandum opinion and order dated June 4, 2004; and for good cause shown; it is

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**ORDERED, ADJUDGED AND DECREED**, that defendant Olivia Miller, Inc., its agents, servants, employees, sales companies, sales representatives, salespersons, distribution companies, and all persons acting in concert therewith, or participating with them, are hereby permanently enjoined and restrained pursuant to Federal Rule of Civil Procedure 65, from importing, manufacturing, causing to be manufactured, purchasing, converting, promoting, selling, marketing or otherwise shipping, delivering, distributing, returning or disposing of any merchandise with designs substantially similar to plaintiff's Copyrighted Designs; and it is

**ORDERED, ADJUDGED AND DECREED**, that plaintiff GMA Accessories, Inc., do recover of the defendant Olivia Miller, Inc., with its principal office located at 330 Fifth Avenue, New York, New York 10001, the sum of Two Thousand Dollars (\$2,000), together with cost and disbursements as set forth in the Memorandum Opinion and Order in the sum of One Thousand Sixty Five Dollars and Seventy Cents (\$1,065.70), together with an award of attorneys fees pursuant to 17 U.S.C. Section 505 in the amount of Five Thousand Dollars (\$5,000), totaling Eight Thousand Sixty Five Dollars and Seventy Cents (\$8,065.70), and that plaintiff has execution therefor.

Judgment signed this 12<sup>th</sup> day of July 2004.

s/ Michael B. Mukasey  
Hon. Michael B. Mukasey, Chief Judge

**APPENDIX C — PRELIMINARY INJUNCTION OF  
THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK  
DATED JULY 15, 2003**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

Civil Action No: 03CV4906(MBM)

GMA ACCESSORIES, INC.,

Plaintiff,

- against -

OLIVIA MILLER, INC.,

Defendant.

**PRELIMINARY INJUNCTION**

Upon the Summons and Complaint, the declarations of GEORGE ALTIRS dated June 20, 2003 and CHASTITY MARTINEZ dated June 20, 2003, the exhibits annexed thereto, and all of the other papers and proceedings heretofore had herein; and

It appearing to this Court that defendant OLIVIA MILLER, INC. has imported and/or manufactured and/or sold or caused to be sold and/or offered for sale FLIP FLOPS with a design clearly copied from plaintiff's copyrighted "HAWAIIAN PUNCH" design and threatens to continue such acts unless immediately restrained by order of this Court; and



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WHEREAS, plaintiff is likely to succeed in proving at trial that defendant OLIVIA MILLER, INC. has infringed upon the copyrighted design appearing in the motion papers, and it appearing that plaintiff is suffering irreparable injury by the availability in the marketplace of seemingly counterfeit goods;

UPON, plaintiff's motion by way of order to show cause returnable on July 10, 2003, there being no opposition thereto, plaintiff having posted security in the amount of \$5,000, and for good cause shown, it is

ORDERED that defendant OLIVIA MILLER, INC., its agents, servants, employees, sales companies, sales representatives, salespersons, distribution companies and attorneys, and all persons acting in concert therewith, or participating with them, pending the trial and determination of this action and until further order of this Court, are hereby enjoined and restrained pursuant to Federal Rule of Civil Procedure 65,

- (a) from importing, manufacturing, causing to be manufactured, purchasing, converting, promoting, selling, marketing or otherwise disposing of any merchandise with designs copied from plaintiff's copyrighted design annexed hereto;
- (b) from further diluting and infringing plaintiff's said copyrighted design and work of art and damaging its respective goodwill;



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- (c) from importing, shipping, delivering, distributing, returning or otherwise disposing of, in any manner, any merchandise with designs copied from plaintiff's copyrighted design; and
- (d) from destroying any record or object relating to this case; and, it is

FURTHER ORDERED, that within 10 days of its receipt of this Preliminary Injunction, defendant OLIVIA MILLER, INC. shall forward a copy of this preliminary injunction to its supplier and its customers that have purchased or received merchandise bearing the design alleged to be infringing in the plaintiff's complaint.

Dated: New York, New York  
July 15, 2003

So Ordered: s/ Michael B. Mukasey  
Hon. Michael B. Mukasey, Chief U.S.D.J.

**APPENDIX D — ORDER OF THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT  
DENYING PETITION FOR REHEARING FILED  
SEPTEMBER 14, 2005**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
THURGOOD MARSHALL U.S. COURT HOUSE  
40 FOLEY SQUARE  
NEW YORK 10007**

Roseann B. MacKechnie  
CLERK

Date: 9/8/05

Docket Number: 04-4465-cv  
Short Title: GMA Accessories v. Olivia Miller,  
Inc.  
DC Docket Number: 03-cv-4906  
DC: SDNY (NEW YORK CITY)  
DC Judge: Honorable Michael Mukasey

At a stated term of the United States Court of Appeals  
for the Second Circuit, held at the Thurgood Marshall United  
States Courthouse, Foley Square, in the City of New York,  
on the 14<sup>th</sup> day of September two thousand five.

*Appendix D*

GMA Accessories, Inc.,

Plaintiff-Appellant,

v.

Olivia Miller, Inc.,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant GMA Accessories, Inc. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,  
Roseann B. MacKechnie, Clerk

By: s/ Arthur Heller  
Motion Staff Attorney



# CERTIFICATE OF REGISTRATION



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

*Marybeth Peters*

**FORM VA**  
For a Work of the Visual Arts  
UNITED STATES COPYRIGHT OFFICE

REG

VAU 458-014



EFFECTIVE DATE OF REGISTRATION

8 18 94  
Month Day Year

OFFICIAL USE ONLY: WRITE ABOVE THIS LINE, IF YOU NEED MORE SPACE, ATTACH A CONTINUATION SHEET.

**1** TITLE OF THIS WORK ▼

HAWAIIAN PUNCH PRINT, P-1084

NATURE OF THIS WORK ▼ See Instructions

ART WORK

PREVIOUS OR ALTERNATIVE TITLES ▼

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

If published in a periodical or serial give: Volume ▼

Number ▼

Issue Date ▼

On Pages ▼

**2** NAME OF AUTHOR ▼

a GHA ACCESSORIES INC.

DATES OF BIRTH AND DEATH

Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?

☒ Yes  
☐ No

AUTHOR'S NATIONALITY OR DOMICILE  
Name of Country

OR { Citizen of ▼  
Domiciled in ▼

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK

Anonymous? ☐ Yes ☐ No  
Pseudonymous? ☐ Yes ☐ No

If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Check appropriate box(es). See Instructions

- |   |   |   |
|---|---|---|
| <input type="checkbox"/> 3-Dimensional sculpture          | <input type="checkbox"/> Map            | <input type="checkbox"/> Technical drawing  |
| <input checked="" type="checkbox"/> 2-Dimensional artwork | <input type="checkbox"/> Photograph     | <input type="checkbox"/> Text               |
| <input type="checkbox"/> Reproduction of work of art      | <input type="checkbox"/> Jewelry design | <input type="checkbox"/> Architectural work |
| <input type="checkbox"/> Design on sheetlike material     |   |   |

NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH

Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?

☐ Yes  
☐ No

AUTHOR'S NATIONALITY OR DOMICILE  
Name of Country

OR { Citizen of ▼  
Domiciled in ▼

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK

Anonymous? ☐ Yes ☐ No  
Pseudonymous? ☐ Yes ☐ No

If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Check appropriate box(es). See Instructions

- |   |   |   |
|---|---|---|
| <input type="checkbox"/> 3-Dimensional sculpture      | <input type="checkbox"/> Map            | <input type="checkbox"/> Technical drawing  |
| <input type="checkbox"/> 2-Dimensional artwork        | <input type="checkbox"/> Photograph     | <input type="checkbox"/> Text               |
| <input type="checkbox"/> Reproduction of work of art  | <input type="checkbox"/> Jewelry design | <input type="checkbox"/> Architectural work |
| <input type="checkbox"/> Design on sheetlike material |   |   |

YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED

a 1999

This information must be given ONLY if this work has been published.

DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK

Complete this information ONLY if this work has been published.

Month ▼

Day ▼

Year ▼

Nation ▼

COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼

GHA ACCESSORIES INC.

1 EAST 33RD ST 9TH FL

NEW YORK, NY 10016

APPLICATION RECEIVED

AUG 18 1999

ONE DEPOSIT RECEIVED

AUG 18 1999

TWO DEPOSITS RECEIVED

FUNDS RECEIVED

TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

MORE ON BACK ► • Complete all applicable spaces (numbers 5-8) on the reverse side of this page.  
• See detailed instructions • Sign the form at line 8.

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Page 1 of 2 pages

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